United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

Original + affidavit of mailing

77-1311

To be argued by
GARY A. WOODFIELD

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1311

UNITED STATES OF AMERICA,

Appellee,

—against—

SOL R. RAUCH, MARC RAUCH and
LAWRENCE CORSA,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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UNITED STATES OF AMERICA,

Appellee,

—against—

SOL R. RAUCH, MARC RAUCH and LAWRENCE CORSA,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Sol R. Rauch, Marc Rauch and Lawrence Corsa appeal from judgments of the United States District Court for the Eastern District of New York (Pratt, *J.*) entered on July 7, 1977, convicting appellants, after a four week jury trial, of fourteen counts of mail fraud, in violation of Title 18, United States Code, §§ 1341 and 2.

Appellants were charged in a fifteen count information [1] alleging that they (along with co-defendant Marvin

[1] Initially, appellants and co-defendant Marvin Urban were charged in a 15-count indictment which contained 10 counts alleging mail fraud violations and 5 counts alleging violations of federal securities law, 15 U.S.C. § 77g(a) and 77X. At a pretrial conference all parties agreed to proceed to trial on a super-

[Footnote continued on following page]

Urban) [2] caused various promotional materials concerning their company, Federal Coin Reserve, Inc., to be placed in the mails, for the purpose of executing a scheme to defraud prospective rare coin purchasers and to obtain money from these sales by means of false and fraudulent pretenses, representations and promises.

Appellant Sol Rauch was sentenced to concurrent three year terms of imprisonment on each count and ordered to pay a fine of $14,000. Appellants Marc Rauch and Lawrence Corsa were each sentenced to concurrent three year sentences (consisting of six months in confinement and probation for the remainder of the term), and they were each fined $2,800. Appellants are all free on bail pending appeal.

On appeal a number of contentions are raised which appellants argue require a new trial: (1) all appellants take issue with various portions of the trial court's charge to the jury; (2) appellants contend that the trial judge's failure to respond to a jury note was error; (3) appellants claim that various actions of the prosecutor constitute misconduct mandating reversal; (4) appellants Marc Rauch and Lawrence Corsa argue that their trial counsel's apparent loyalty to co-appellant Sol Rauch resulted in a conflict which denied them effective assistance of counsel; (5) Sol Rauch and Lawrence Corsa question the suffi-

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seding information which merely transformed the 5 security fraud counts into mail counts. This was done at the suggestion of the trial judge to eliminate from the jury's consideration the issue of whether the sales of coin portfolios constituted an "investment contract." (See, *SEC* v. *Brigadoon Scotch Distributors, Ltd.*, 388 F. Supp. 1288 (S.D.N.Y. 1975)). Prior to the commencement of trial, appellants signed formal waivers of indictment in open court. See p. 38, *infra*.

[2] Prior to trial co-defendant Marvin Urban's case was severed from appellants. On July 7, 1977, upon the government's motion, the indictment was dismissed as to Urban.

ciency of the evidence which convicted them; (6) Sol Rauch contends that the prosecution improperly proceeded by means of an information rather than indictment; (7) Lawrence Corsa argues that the trial court "coerced" him into waiving indictment and proceeding by information; (8) Marc Rauch contends that the trial court's jury selection procedure violated Rule 24, F.R.Cr.P., and (9) all appellants raise a litany of alleged errors which, although unobjected to at trial, are now claimed to constitute plain error when considered cumulatively.

Statement of Facts

The Government's Case in Chief

1. During the later part of 1973 and throughout 1974, Federal Coin Reserve Inc. ("FCR") conducted, from its offices at 277 Northern Boulevard, Great Neck, New York, a sophisticated mail order business selling rare United States coin portfolios for investment purposes. Through nationwide advertising in newspapers and professional trade magazines and attendance at professional conventions, FCR appealed to investors to buy its coins as an alternative to stock market investments.

FCR commenced its operations in the summer of 1973 but had few sales until appellants Marc Rauch and Lawrence Corsa began to run the business in December 1973 (2183, Ex. 123, 124).[3] Within weeks after Marc Rauch and Corsa entered the business, they acquired ownership of FCR and as President and Vice-President, respectively, ran it until December 12, 1974, when the

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[3] Numbers in parentheses preceded by "A" refer to pages in Appellant's Appendix. All other references are to pages of the trial transcript, unless otherwise noted.

SEC obtained a temporary restraining order banning it from doing business (2181, 2492-95).

During the year FCR was operated by appellants Marc Rauch and Lawrence Corsa, FCR solicited business largely by means of telephonic "sales pitches" by its commissioned salesmen, who used the "WATTS" lines of Hartford Chemical Company, a chemical supply business which was owned by appellant Sol Rauch's brother, Harold Rauch (2120). A potential investor, upon reading FCR's ad in a newspaper or trade magazine, would mail an attached coupon to FCR (108, 151, 229, 355, 533). Thereafter, a brochure entitled "The Coin Market and Capital Growth" was mailed by FCR to the prospective investor (108, 151, 229, Ex. 20). Soon after receipt of this brochure, a salesman from FCR would telephone the potential customer and present a "sales pitch" (536, 580, 690, 757). If this presentation was successful, the customer would send in the required amount of money (the $3,300 portfolio was FCR's main sales item), and in four to six weeks a portfolio of rare U.S. coins would supposedly be mailed to the investor (160, 316, 406, 407, 585, 640).

"The Coin Market and Capital Growth" ("the blue brochure"), a thirty-two page brochure containing many photographs and charts, was FCR's main piece of sales literature (410, Ex. 20). The introduction to this blue brochure is what appears to be, but in fact is not, a personal letter to potential investors from William McChesney Martin, Jr., former Chairman of the Federal Reserve Board, acclaiming the advantages of investing in rare coins (Ex. 20). The blue brochure then proceeds to cover various aspects of investing, the particular features of coin investing and the "unique" services FCR can purportedly provide the coin investor.

The first twelve pages of the brochure, through the use of charts and graphs, compares the capital appreci-

tion of coins favorably to other forms of investment. Through the accompanying text, which includes many erroneous statements—such as the claim that no U.S. coin has failed to increase in value in the last thirty years—the blue brochure explains why "Big Business" is entering the investment area of rare coins (1512, Ex. 20, p. 11). Interpersed with photographs of the U.S. Treasury, the Federal Reserve Board and other governmental buildings, this introductory section states:

> "THE HARTFORD INVESTMENT GROUP, offers several sound media to meet individual investment goals through unique and often highly intricate investment mechanisms. THE HARTFORD INVESTMENT GROUP offers the services of its expertise to achieve the greater investment return to the very affluent. THE HARTFORD has found significant capital appreciation to be a fact through numismatic collection an dselection." (Ex. 20, p. 5).[4]

Then, after a two page history of coins which contains erroneous and misleading information (1514), the blue brochure devotes four pages to a description of FCR itself (Ex. 20, pp. 15-18). Here are set forth the various services FCR can supply its investors, such as accounting services, daily quotes on coin prices, financial statements,

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[4] The Hartford Investment Group, mentioned throughout this brochure and in the sales presentations to potential customers as the management consultant to FCR in areas of coins selection and investment expertise, simply did not exist (434, 2795-97). This non-existent entity's name, apparently intended to give an aura of respectability to FCR, was associated in at least one "sales pitch" with the Hartford Insurance Company (972).

advice on estate planning and taxes and personal consultation.[5]

The majority of the remainder of the blue brochure presents information regarding coins in general, discusses instances of their great appreciation in value over the years and provides examples of available portfolios for purchase. Throughout this section there also exists various misleading and erroneous material (1521-1527).

Page 32 of the blue brochure concerns the mechanics of purchase and sale of coins from FCR and sets forth FCR's 15-day unconditional guarantee. When a customer's money is received, according to the brochure, ". . . THE HARTFORD GROUP professionally selects the coins for investment purposes." FCR's guarantee, set forth in large print, states:

> "EACH COIN PORTFOLIO IS SUBJECT TO A FIFTEEN (15) DAY UNCONDITIONAL INSPECTION GUARANTEE AND IS ACCOMPANIED BY ITS CERTIFICATE OF REGISTRATION AND AUTHENTICITY OF CONDITION."

As noted (p. 4, *supra*), a few days after receiving this literature in the mail, the potential investor would receive a call from an FCR salesman. This "sales pitch" by telephone dealt with coin investing generally and the advantages of investing through FCR. The potential customers were told that FCR had a large staff of trained and registered numismatic experts who would personally select a coin portfolio for them from FCR's inventory

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[5] In order to provide a fuller sense of the brochure's various claims of service and its manner of presentation (obviously designed to impart an image of an old, large and established business), we have set forth the entire text of these pages of FCR's brochure in our Appendix, *infra*.

(111, 229, 357, 537, 685, 965). The erroneous impression was also conveyed that FCR was an old, established company (533, 582, 607, 684, 965), sanctioned by the SEC (536), and that it had the backing of a major New York bank (685) and had been audited by the accounting firm Price, Waterhouse (687).

The potential investor was told that FCR would provide accounting services and financial statements, and offer suggestions for additional purchases (231, 686). Mention would also be made of the Hartford Investment Group, purported to be a large, established investment group on the East Coast (111, 636), which was affiliated with the Hartford Insurance Company and supplied FCR with accounting services and investment consultation (111, 636, 972). See n.4, *supra*.

The salesmen further told the potential investor that the coins FCR sold to customers had a market value equal to the price paid (157, 237, 550, 690, 758). This equivalence was supposedly possible because FCR had special sources of supply of coins (606) and had such a large inventory that the coins appreciated while in FCR's vaults (551, 758).

The 15-day unconditional guarantee set forth in the blue brochure became much more attractive in the sales pitches. Rather than a mere 15 days for dissatisfied customers to receive a full refund, the time period was extended to varying lengths ranging from two years (583-84) to any time at all (537, 687). Moreover, so professedly sure was FCR that the coins received by customers had a market value of at least the price paid (despite FCR's mark-ups and commissions), customers were told they could have their coins appraised by a local coin dealer and, if the coins were appraised at a value less than the purchase price, FCR would refund the difference (112, 237, 358).

2. As could be expected, these alluring offers and statements, relied upon by distant, busy professionals who had money to invest and possessed no numismatic expertise, had the desired result. Throughout 1974, while FCR was run by appellants, investments continued to increase. Unfortunately for the investor, a great many of the statements in the blue brochure or the representations made by the salesmen were untrue (431-434). Those fortunate enough to receive coins from FCR received grossly overgraded and overpriced coins well after the promised 4-6 weeks (1468, Ex. 163). Many investors received no coins at all (130, 322, 428, 612, 699). Attempts by those who received coins to exercise the guarantee proved impossible (170, 644-47, 1086-88). Efforts by those who never received coins to obtain either coins or their money back met total frustration (130, 324, 360, 611, 699). Both those who received coins and those who did not were confronted with lies and deceit in their efforts to deal with FCR (118-124, 168-70, 1097-99).

Since FCR was run as a family business, the government's case essentially consisted of testimony of customers who related to the jury their dealings with FCR. Thirteen such customer-witnesses discussed their initial dealings with FCR, their investments in coin portfolios and their frustrations arising either from their failure to receive coins at all or, if they did receive coins (130, 322, 360, 613, 644, 699), from their futile attempts to exercise their contractual guarantees (168-170, 709, 1088). Typical of these frustrations are the experiences Barbara Wisniewski, Dr. Edward Brackett and Angelo Pieroni had with FCR.

Barbara Wisniewski, an accountant from San Francisco, California, decided to purchase a $4,300 portfolio of rare coins after reviewing the blue brochure and talking to an FCR salesman who, among other things, assured her that her coins would be valued at $4,300 and that, if a

local appraiser valued them at less, FCR would pay the difference (112).

On September 3, 1974, Ms. Wisniewski sent the full purchase money ($4,300) to FCR and awaited delivery of her coins (113). After some weeks passed, the coins had not arrived; she began making daily calls to FCR, but was never able to speak to anyone other than a secretary (114). On October 17, 1974, salesman Bob Gordon called from FCR and advised her that FCR had received her money and that her coins would be shipped by October 31, 1974 (114). Although she did receive the Certificate of Authenticity (116, Ex. 80) describing the coins in her portfolio, she received no coins. Ms. Wisniewski recommenced her daily calls to FCR. Finally, on November 12, 1974, she spoke to Margo Corsa (wife of appellant Lawrence Corsa and daughter of appellant Sol Rauch), who assured her that her coins would be shipped that day (117).

Thereafter, when Ms. Wisniewski still did not receive her coins, she again began calling FCR but could never speak to anyone other than a secretary, and no one would return her calls (118). On November 20, 1974, Margo Corsa called Ms. Wisniewski and advised her that her coins were "lost" in the mail (118). This prompted Ms. Wisniewski to complain to the Better Business Bureau. Ms. Wisniewski received a copy of FCR's response to the BBB, in which FCR blamed the lack of delivery on a United Parcel Service strike (119, Ex. 81).

Ms. Wisniewski, continuing her daily calls to FCR, also wrote letters to FCR demanding a refund of her money (119). Finally, on December 5, 1974, she was able to speak to appellant Sol Rauch, who advised her that he was FCR's attorney. Although stating to her that she was ". . . being unreasonable with [her] request [for a refund] and . . . was pestering the company", appellant

Sol Rauch told her that he would call her back the next day with an answer (122). Thereafter, Ms. Wisniewski received an unsigned letter from FCR advising her that all her coins except one had been "found" in FCR's vault (123).

Without any further communication with FCR, Ms. Wisniewski received a check for $425 and a letter from FCR signed by its former general manager Al Cito, who had not worked for FCR in more than a month. The letter explained that the $425.00 represented the proceeds of the sale of one of her coins (124, Ex. 85). The following day she received another check for $760.00 and a letter stating that the money was for the sale of another of her coins (124, Ex. 86). Obviously mystified since she had never authorized anyone to sell her coins, Ms. Wisniewski again began calling FCR but could not speak to anyone other than secretaries (129). Although when initially deposited in her bank account the checks received from FCR "bounced", they did eventually clear (129). Interestingly, the two coins which FCR "sold" for Ms. Wisniewski, as evidenced by the Certificate of Authenticity she had received months earlier, were the two least expensive coins of her portfolio (126, 127). At the time of her testimony, more than two years after her investment, Ms. Wisniewski was still owed $3,115.00 (130).

Dr. Edward Brackett, an orthopedic surgeon from Oak Park, Illinois, visited FCR's presentation booth at a medical society convention held in Chicago during the summer of 1974 (682). There, he received literature and discussed coin investing and FCR with a salesman (684). Dr. Brackett was told of FCR's large size, its backing by a major New York bank and its staff of experts (684). Dr. Brackett was also assured that FCR would repurchase at anytime his portfolio for at least the price paid (684).

Thereafter, Dr. Brackett received a number of telephone calls from an FCR salesman, who told him that a $4000 portfolio had already been selected for him and FCR was only awaiting the receipt of his money to mail this portfolio to him (690). After receiving a letter dated September 17, 1974, again assuring him that FCR was holding a portfolio for him, Dr. Brackett, on September 30, 1974, sent FCR $4000 (691). Dr. Brackett never received any coins and his efforts to contact FCR proved fruitless (694).

Angelo Pieroni, an insurance adjustor from Bellmore, New York, saw FCR's ad in the New York Times in August, 1974. He received the blue brochure and particularly noted the 15-day unconditional guarantee (1072-73). Since he resided near FCR's offices, Mr. Pieroni met with Al Cito, who was then FCR's general manager, and discussed investing in rare coins (1075). Mr. Pieroni decided to invest and on September 5, 1974, he sent FCR $5000 (1078). Thereafter, he received a letter from FCR signed by appellant Lawrence Corsa, welcoming him into FCR's "membership" (1079). On October 26, 1974, he received his coins (1080).

With the 15-day guarantee in mind, Mr. Pieroni immediately had his coins appraised by two local coin dealers (1084-85). Upon receiving appraisals of less than half their stated value, Mr. Pieroni called Cito and advised him that he wished to exercise FCR's guarantee. This call was made approximately five days after he had received his coins (1086). Cito arranged for Mr. Pieroni to meet with FCR's numismatists—appellants Marc Rauch and Lawrence Corsa (1087). Appellants refused to honor the 15-day guarantee (1087). Even though Mr. Pieroni subsequently obtained a third appraisal and forwarded all three of these written appraisals to FCR demanding a refund, he heard nothing further from FCR (1092).

On December 31, 1974, pursuant to a subpoena issued by the SEC, Mr. Pieroni appeared in the United States

District Court for the Southern District of New York to testify before Judge Lasker (1094). Prior to actually testifying, Mr. Pieroni was approached in the men's room by appellant Sol Rauch (1095). Appellant Sol Rauch agreed to refund Mr. Pieroni's $5000, and a date the following week was arranged (1097). Appellant Sol Rauch then advised Mr. Pieroni that since this agreement had been reached, ". . . I [Mr. Pieroni] should more or less take it upon myself to act accordingly as to my testimony" (1098).

Thereafter, Mr. Pieroni testified and related the men's room meeting with appellant Sol Rauch to Judge Lasker (1099). The following week a secretary from FCR called Mr. Pieroni and cancelled his appointment with appellant Sol Rauch for a refund. Subsequent attempts to reschedule this meeting proved fruitless (1099).

On December 12, 1974, the SEC obtained an injunction from Judge Lasker preventing FCR from soliciting any further business.[6] Subsequently, FCR's assets were frozen and a receiver was appointed to refund available monies to the investors (3289-90). However, while at least 92 customers had sent their money to FCR and were awaiting delivery of their coins at the time of the injunction, the receiver found no money or coins among FCR's assets, which totalled a few hundred dollars (3296).

3. Al Cito, FCR's general manager during much of the relevant period, testified as to the operational aspects of FCR. He provided evidence as to how the company was essentially run by appellants Marc Rauch and Corsa, who shared offices with appellant Sol Rauch (398). Cito testified to the frequent lengthy meetings held by appel-

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[6] Judge Lasker's order and opinion are reported. See *SEC* v. *Brigadoon Scotch Distributors, Ltd.*, 388 F. Supp. 1288 (S.D.N.Y. 1975).

lants among themselves (402, 403). He also advised of the four or five meetings which he did attend, conducted by appellant Sol Rauch, in which the general business and quest for profits dominated discussion (421, 422).

Cito explained how the functions of the business continually deteriorated until he was prompted to advise appellants in writing on August 7, 1974, that he would not take responsibility for the mounting delays in coin delivery, FCR's failure to send refunds and to timely pay its bills (414, Ex. 122). A meeting with appellants regarding the memo did nothing to alleviate the problems (418).

On November 4, 1974, Cito was dismissed as general manager by appellant Sol Rauch and his brother (425). At that time 92 customers who had previously sent their money to FCR were awaiting delivery of their coins (428). Cito further testified that many of the representations regarding FCR's services set forth in FCR's main piece of sales literature, the blue brochure, were not truthful (432-434).

Harvey Stack, a prominent New York City coin dealer provided expert testimony concerning the grading and prices of FCR's coins and misrepresentations and errors present in the blue brochure (1512-27). Of the 19 coins received by the FCR customers who testified, Stack found 18 to be overgraded and overpriced (1468, Ex. 163). The consistent pattern of overgrading coins by FCR was revealed with the resultant grossly inflated prices (Ex. 163).

The government introduced additional evidence establishing appellant Sol Rauch's control of the finances of FCR (1195) and the equal and continuously increasing salaries received by all appellants (1240).

The Defense Case

In their opening statement to the jury and throughout the trial appellants contended that they operated a legitimate business that would have been successful but for the improper actions by the SEC in enjoining their operation. They argued that no misrepresentations existed and that the prosecution was unfair because the evidence consisted solely of FCR's "unsatisfied customers" (32).

Appellants presented as witnesses five family members who added nothing to the case (2103, 2152, 2030, 2037, 2054). Nor did appellants present any expert evidence to contradict the government's expert testimony regarding the misgrading and overpricing of FCR's coins.

All appellants testified. Appellant Sol Rauch testified that he was the attorney for FCR whose only involvement with the company was to obtain four or five loans for FCR (2183, 2199, 2207). He claimed that his weekly salary received from FCR, amounting to $490 a week by the latter part of 1974, was really attorney's fees for obtaining those 4 or 5 loans, which totalled $90,000 or $100,000 (2316). Appellant Rauch argued that, as attorney for Brigadoon Scotch Distributors, he devoted his full time during 1974 to confronting the approximate $800,000 in claims which that entity had outstanding. Thus, he maintained, he was unable to become involved at all in FCR (2288, 2293-96). Appellant Sol Rauch failed to recall any business meetings he had with appellants Marc Rauch and Lawrence Corsa regarding FCR (2307). Similarly, he did not recall any meetings with Al Cito concerning FCR (2310).

Sol Rauch further testified that when the assets of FCR were frozen by order of Judge Lasker on December 12, 1974, he voluntarily provided FCR's receiver with all FCR's books and records (2232, 2238).

Although minimizing his role with FCR as merely the attorney, appellant Sol Rauch was impeached by his previously given grand jury testimony and Diner's Club card receipts demonstrating extensive travel and expenses by Sol Rauch on behalf of FCR (2432, 2444, 2452). Moreover, while acknowledging that after FCR's assets were frozen Judge Lasker required FCR to report all its expenses to the court, Sol Rauch admitted to incurring additional Diner's Club expenses in excess of $1000 for travel to, and entertainment in, the Bahamas—all after the court injunction, without FCR's ever advising the court (2445-46). Although claiming initially that all these expenses had been paid, he had no explanation when confronted with his outstanding Diner's Club bill of over $6,000 in company-related expenses (2444, 2452, Ex 184).

Appellant Marc Rauch testified at length. He admitted that he and appellant Lawrence Corsa owned and ran FCR although neither ever spoke to their salesmen regarding the company and the services it offered (2488, 2492, 2737). Appellant Marc Rauch stated that he and Corsa made "substantial" changes in the blue brochure, eliminating the "investment" aspect of the brochure but leaving in those statements they thought were correct (2549, 2558, 2780). In an attempt to lessen the impact of the many misrepresentations contained in that portion of the brochure which concerned FCR and its services (Gov't Appendix, pp. 1a-6a), Marc Rauch contended that the services offered to FCR's "members" applied not to customers but to FCR's franchises (2786, 2788-90). However, he admitted that this limitation was not explained in the brochure, and he was unable to explain its meaning in answer to a question of the Court (2788-90, 3058). Thereafter, he was impeached by his grand jury and SEC testimony wherein he testified that, in fact, the term "members" in the blue brochure meant FCR's customers (3048-51).

Appellant Marc Rauch also had an answer as to what was "The Hartford Investment Group", the expert management consultants to FCR in the area of coin selection and investments (Gov't Appendix, p. 2a). The Hartford Investment Group, he explained, was merely a trade name of FCR and was composed of Marc Rauch, himself and Lawrence Corsa (2797). This novel position was undermined by Marc Rauch's own grand jury and SEC testimony, which revealed that as president of FCR he did not even know what the Hartford Investment Group was (3039, 3040).

Appellant Marc Rauch further testified that FCR did no business at all after the SEC injunction and that he consented to the permanent injunction only after he was threatened by an SEC attorney with criminal prosecution 2561). However, he was confronted with the injunction, where in it he swore that no threats had been made to him to sign the document (2963, Ex. 186).

Marc Rauch failed to recall negotiating an $11,200 loan for FCR with James O'Donovan wherein coins were to be held by a "bonded trustee" as collateral, even though FCR had only four or five such loans (3010, 3021-22). Loan documents containing his signature failed to refresh his recollection (Ex. 190). Similarly unrefreshed was Marc Rauch's memory regarding any transactions FCR had with a number of individuals, including Dr. Calderone and William Walter (3158). However, he maintained that, except for the witnesses called by the government, all of FCR's approximately 500 customers received either their coins or their money back, if requested (2860, 3110). In fact, Marc Rauch testified, he went to the SEC and cleared up every complaint to everyone's satisfaction (3076, 3090, 3108). When confronted with specifics, however, Rauch could not explain what had happened to dissatisfied customers' purchase money—*e.g.*, Dr. Abbe's $2000 (3074), or Dr. Deresinki's $600 (3074), or Dr.

Spyropoulos' $770 (3070), or Barbara Wisniewski's $3,150, or Dr. Brackett's $4000 (3075). He thought this money might be with FCR's court-appointed receiver (3074).

Appellant Corsa testified that his main job at FCR was the buying and grading of coins (3212). After adopting fully and position of Marc Rauch, Corsa merely repeated a number of Rauch's responses (3225, 3227).

In an apparent attempt to contradict the testimony of the government's expert witness, appellants produced Mark Singer, a coin dealer on Long Island from whom they had purchased coins (2595). Although not asked to give his opinion as to the grade and price of the coins in evidence, Singer related the conversations he had with Sol and Marc Rauch and Lawrence Corsa wherein appellants requested him to provide coin portfolios to FCR totalling $2000, which they in turn would sell to their customers for $3,300 (2631-32, 2635). Singer provided this service to FCR, but advised them that their customers could purchase these coins cheaper and that for a successful business their price structure should change (2678, 2679).

Singer ceased doing business with FCR because of the continuous calls he received from Marc Rauch and Corsa asking elementary questions about coins (2645). When asked to provide his opinion regarding appellants' expertise, Singer stated that they had ". . . as much numismatic knowledge as a moderate collector" (2646).

The Government's Evidence on Rebuttal

In rebuttal the government called two additional customers of FCR—Dr. Calderone, who invested $1000 on October 7, 1974, and received nothing; and William Walter, who forwarded $1000 to FCR in bi-weekly in-

stallments from July 1974 through February 13, 1975 (3261, 3356-58). He also never received his coins or a refund (3360). Judge Pratt allowed this testimony both on the theory of similar acts and on the issue of credibility, and so charged the jury in a supplemental limiting instruction (3262).

FCR's court-appointed receiver, Martin Siegel, related the difficulties he had in obtaining the books and records from appellants; Siegel finally resorted to an order to show cause before Judge Lasker (3292, 3293). Although records were eventually provided, Siegel was of the opinion that they were incomplete; thus, he was unable to perform his function as a receiver (3295). In any event, his marshalling of FCR's assets resulted in obtaining only a few hundred dollars from various bank accounts and no rare coins at all (3296). He stated that he had received approximately 20 to 30 unsolicited complaints and inquiries from FCR customers and was aware of approximately 70 complaints received by the SEC (3299, 3300). Appellants did not object to this hearsay testimony, but in fact, explored it in some detail on cross examination (3313).

ARGUMENT

Appellants allege a whole host of errors, virtually all of which are (at most) clearly harmless in light of the overwhelming evidence against all appellants. In any event, appellants' claims have no substantive merit, as we show below.

POINT I

The Trial Judge's Charge to the Jury Was Proper in all Respects.

Appellants Sol Rauch and Corsa raise a variety of frivolous issues directed towards the trial judge's charge to the jury. Appellants claim that the accumulation of the alleged errors constitute plain error.

At the outset, it should be noted that appellants have waived their rights to assign as error any portion of the charge since neither appellant took exception to any portion of it. Rule 30, F. R. Cr. P. In fact, when given his opportunity to register any exceptions, appellant Sol Rauch congratulated the trial judge for an "extremely fair" charge. (3675). It is well settled in this circuit that in the absence of clear error by the trial judge in his instructions, a defendant waives all objections to the charge given where he failed to make timely request for, or object to, the instructions. *United States* v. *Bermudez*, 526 F.2d 89 (2d Cir.), *cert. denied*, 425 U.S. 970 (1975).

In any event, as we show below, there was no error whatever in the trial judge's instructions.

A. Knowledge and Willfullness

Appellant Sol Rauch initially claims that the trial judge deviated from the standard charge concerning an essential element of the crime, fraudulent intent, in that he improperly substituted "voluntarily and intentionally" for "knowingly and willfully". However, the court's charge on this point is the proper (and accepted) charge for intent to defraud. The Court charged:

> "To act with intent to defraud means to act voluntarily and intentionally and with the specific in-

> tent to deceive, ordinarily for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself" (3651).

United States v. *Lepowitch*, 318 U.S. 702, 704, reh. denied, 319 U.S. 783 (1943); Federal Jury Practice and Instructions, 3d Ed. § 16.05.

The term "voluntarily and intentionally" is not only an integral part of the standard charge for "intent to defraud", but is likewise utilized to define the terms "knowingly", Federal Jury Practice and Instructions, 3d Ed., § 14.04, as well as "willfully", *id.* at § 1406. *See*, *United States* v. *A & P Trucking Co.*, 358 U.S. 121 (1958); *United States* v. *Ruffin*, — F.2d — (2d Cir.), No. 77-1160, decided February 27, 1978.

B. Specific Intent

Appellant Sol Rauch claims that the charge on "specific intent" was defective because that term was never defined by the trial judge.

We agree that one of the elements of the crime of mail fraud is the specific intent to defraud. *United States* v. *Regent Office Supply*, 421 F.2d 1174 (2d Cir. 1970). However, the district court fully explained to the jury the element of specific intent to defraud (3651-52). Thus, the district court explained to the jury that "[t]o act with intent to defraud means to act voluntarily and intentionally and with specific intent to deceive"; that "[f]raudulent intent may not be presumed or assumed"; that "[b]ad faith is an essential element of fraudulent intent"; and that "[s]uch person voluntarily and intentionally attempted to deceive another". The district court fully elaborated on each of these explanations.

C. Reasonable Doubt

Appellant Sol Rauch takes issue with various aspects of the court's charge on reasonable doubt. Relying on *United States* v. *Bridges*, 499 F.2d 179 (7th Cir. 1974), 419 U.S. 1010, appellant claims that the court erred when it charged that "reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty they might be, would be convicted" (3631-32). Contrary to appellant's suggestion, the court in *Bridges* did not even consider the language which appellant objects to here. Rather, the court in *Bridges* criticized quite a different phrase—"that reasonable doubt is not for guilty men to escape" (499 F.2d at 186)—and did not reverse on that ground. Appellant does not explain the connection between these obviously different statements.[7]

D. Inference

Appellant Sol Rauch further argues (Br. 49) that the district court erred in instructing the jury "to draw whatever *inference* [emphasis supplied] may be called for by the evidence". Specifically, he asserts (Br. 50) that this language was deficient "in that it fails to instruct the jury that it may refuse to draw an inference or may draw more than one inference". Appellant bolsters his argument by misquoting the record. Actually, the court charged (3634-35):

> "Also, it is for you, the jury, to draw whatever *inferences* [emphasis supplied] may be called for by the evidence."

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[7] Nor does appellant Sol Rauch explain his contention that the district court singled him out when it charged that reasonable doubt "is not sympathy for the defendant" (3631).

It is clear from this language that the district court did not tell the jury that it could draw only one inference. Nor are we aware of anything else in the record which would suggest a contrary conclusion.

E. The "Information"

Appellant Sol Rauch contends that the district court erred when it substituted the phrase "United States Attorney" for "Grand Jury" in reading the superseding information to the jury. The superseding information, to which all parties consented (see n.1, *supra*), retained references to the Grand Jury by inadvertent error. Appellants can hardly argue that there was any error, much less prejudicial error, in the court's *sua sponte* decision to make this correction. See pp. 39-40, *infra*.

F. Aiding and Abetting

Appellant Sol Rauch claims that the trial judge's charge on "aiding and abetting" was defective because the court failed to charge specific intent. Sol Rauch argues further that the aiding and abetting charge was in reality a conspiracy charge. These contentions are meritless.

The district court clearly charged the jury that specific intent is an essential element of aiding and abetting when he stated (3660):

> "Hence, if a person voluntarily unites his efforts with one or more others to bring about the commission of a crime, he is equally guilty with the others and they with him, provided that he is conscious of the nature of the criminal venture and intentionally associates himself in its furtherance and actively participates in bringing about accomplishment of the criminal venture . . .".

See, *United States* v. *Erb*, 543 F.2d 438 (2d Cir.), *cert. denied*, 97 S.Ct. 493 (1976). See also, *United States* v. *DeJesus*, 289 F.2d 37, 40 (2d Cir.), *cert. denied*, 366 U.S. 963 (1961); *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Moreover, by instructing the jury that the defendant must have actively participated in the commission of the crime, the trial judge clearly was not presenting a conspiracy theory to the jury.

Appellant Sol Rauch further argues that the trial court erred when it did not charge the jury that they must disregard the names of customers who allegedly did not receive coins and who were not called as witnesses by the Government. Again, the record belies Sol Rauch's contentions. In instructing the jury as to what evidence to disregard, the district court stated (A. 34):

> ". . . questions which ask the witness 'Do you know' or 'Are you aware that X is true' when the witness responded 'No.' You must not draw any inference concerning fact X from the mere asking of such a question."

With respect to the customers who were not called as witnesses by the Government, the trial court specifically stated (in part) (A. 34):

> ". . . you should disregard them altogether since no evidence has been presented that those individuals did not receive coins and you must decide the case only on the basis of the evidence which is before you."

G. Expert Testimony

In claiming that the trial judge erred in failing to instruct the jury on the significance of expert testimony, Sol Rauch neglects to indicate that the court gave such an instruction during the trial itself immediately prior

to the testimony of Government expert Harvey Stack (1452-1453).

H. Marshalling Evidence, Materiality and Conscious Avoidance

Appellant Corsa takes issue with Judge Pratt's failure to marshal the evidence in his charge and to charge that a gross disparity between price and value of the coins was a material element of the offense. Also, Corsa contends that the evidence did not justify an instruction on "conscious avoidance".

It is well settled that a trial judge is not required to marshall the evidence for the jury. *United States* v. *Cohen*, 145 F.2d 82, 92-93 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1943). Indeed, "in the opinion of many trial lawyers and judges, it is better left undone".[8] *United States* v. *Cahalane*, 560 F.2d 601, 607 (3d Cir. 1977).

Appellant Corsa also suggests that the district court's definition of materiality was "too lenient" (Br. 15). Corsa apparently complains of the court's use of the word "could" rather than "would" in charging (3649-50):

> "By material, I mean simply facts which *could* [emphasis supplied] reasonably be expected to induce a person to decide whether to act or not to act and in this case to purchase or not to purchase coins from Federal Coin Reserve."

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[8] We note that the trial judge here did not charge the jury in a factual vacuum. Besides reading the information to the jury, the judge did refer to the testimony of numerous witnesses in his charge (3634, 3648, 3649, 3653, 3654, 3659, 3668, 3676, 3677).

Under settled authority, the court's charge here was entirely proper.[9] Federal Jury Practice & Instructions § 54.08. See also, *Williams* v. *United States*, 368 F.2d 972, 975 (10th Cir. 1966), *cert. denied*, 386 U.S. 997 (1967); *Kreuter* v. *United States*, 218 F.2d 532, 535 (5th Cir.), *cert. denied*, 349 U.S. 932 (1955).

Corsa makes a related argument that the district court erroneously omitted telling the jury that "proof of a gross disparity between the price and value of the coins was a material element of the offense" (Br. 14). As we have argued, the court properly charged the jury on materiality. *United States* v. *Regent Office Supply, Inc.*, 421 F.2d 1174 (2d Cir. 1970), on which Corsa relies, does not require proof of a "gross disparity" here, but merely states that advertising claims "enter the realm of fraud where the product must inherently fail to do what is claimed for it" (*id.* at 1180). In any event, Corsa surely would not now argue that, with respect to the many customers who never received coins at all, there was no "gross disparity" between purchase price and the value of goods received.

Finally, Corsa complains that the district court wrongly charged the jury that the defendant acted "knowingly" if (*inter alia*) he "deliberately closed his eyes to what he had every reason to believe was the fact" (Tr. 3657). It is settled, however, that "knowledge" in a case such as this may consist of conscious avoidance. *United States* v. *Olivares-Vega*, 495 F.2d 827, 830 (2d Cir. 1974); *United States* v. *Joly*, 493 F.2d 672, 675 (2d Cir. 1974).

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[9] Corsa misplaces his reliance on *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976), which involved an interpretation of the term "material" in section 14(a) of the Securities Exchange Act of 1934.

POINT II

The Trial Judge's Decision Not To Respond Immediately To An Ambiguous Jury Note and To Request Clarification Was Proper.

All appellants contend that the trial judge erred when he did not immediately reply to the jury's note requesting a definition of "willfully intent" (3682). Appellant also argues that the trial judge "browbeat" the jurors by asking them to redraft their request. These contentions have no merit.

1. The jury, which began the day in question at 9:05 A.M. (3442), heard three summations, the prosecution's rebuttal summation and the court's charge, and then retired to deliberate at 3:35 P.M. (3677). At 5:20 P.M., the jury submitted a note; neither the trial judge nor counsel could decipher whether the note requested a definition of "willfully enter" or "willfully intent" (3679-3681). Since neither phrase appeared in the court's charge, all parties were at a loss to interpret the meaning of the note (3681). After discussion with counsel, the trial judge decided to request further clarification from the jury before responding to their note (3681). The judge was then advised by the jury that it was requesting the meaning of "knowingly and willfully devise and intend to devise" in the information.

Noting that it was 5:30 P.M. and indicating that he wished to think about the matter, the trial judge asked the jury whether it wished to continue its deliberations into the evening, return the next day (Saturday) or return on Monday. The judge indicated that if the jury wished to remain and deliberate that evening, he would work on his response to their request (A. 82). The trial judge then sent the jury back to the jury room for the purpose of

deciding whether and when to continue their deliberations (3684).

In discussing the matter with counsel, the trial judge then noted that about eight pages of his charge dealt with the concept of intent, and he offered to reread those pages to the jury (A. 83). Counsel for appellants Marc Rauch and Lawrence Corsa requested that a short definition of "willful intent" be read to the jury (A. 84). Appellant Sol Rauch commented again that the charge was "extremely fair" and suggested that the court respond to the note by rereading the portions of the charge on intent (A. 84).

Everyone thereupon agreed to wait for the jury's decision as to when to resume deliberations. When the jury returned, the foreman stated that the jury wished to resume deliberations on the following Monday morning. The trial judge gave the jury a cautionary instruction not to discuss any aspects of the case with anyone (A. 85). The judge then, without objection, recessed the proceedings (A. 86).

On Monday morning, the trial judge stated, again without objection from counsel, that for purposes of further clarification, he would ask the jury "to state more fully in writing what it is they want to know, then we will answer it" (A. 87).

After the jurors were brought into the courtroom, the judge addressed them as follows:

> The Court: Good morning, Ladies and Gentlemen. Hope you had a nice weekend.
>
> Back to the question which you asked on Friday, which I have marked Court's Exhibit 11, "Can we have a definition of willfully enter?"
>
> There seemed to be some disagreement as to really what was intended to be asked.

> I think before I attempt to answer the question I am going to ask you to go back into the Jury Room, the one in which you were deliberating, and write out a little more fully what it is you really want me to tell you. Then I will be able to respond to it and there won't be guessing on my part, and you will also have the information that you want. So, if you will go in and do that, I will answer your question as quickly as I can, and then you can proceed with your deliberations (A. 87-88).

The jury retired to the jury room and the following exchange took place:

> Mr. Goldman: Yes, I may be mistaken. I think you said to the jury just now "willfully enter". Again, because their note was unsure, you meant willfully intent?
>
> The Court: That's what the Foreman said, but one of the other jurors said willfully enter. So, that's why I want them to tell me what they want rather than have us guess (A. 88).

Defense counsel never objected to the judge's effort to seek clarification from the jury nor did they offer any alternative methods to handle the situation. Later that morning, the jury submitted a note advising the judge to disregard their earlier request. Shortly thereafter, the jury returned with a verdict (A. 90).

2. Appellants can hardly find fault with the judge's handling of the jury's request. Whether to reinstruct a jury is well within a trial court's discretion. *United States* v. *Braverman*, 522 F.2d 218 (7th Cir.), *cert. denied*, 423 U.S. 985 (1975); *United States* v. *Neville*, 516 F.2d 1302 (8th Cir.), *cert. denied*, 423 U.S. 925 (1975). See also, *Quercia* v. *United States*, 289 U.S. 466, 469 (1973). Since supplemental instructions can be extremely influential, a

trial judge should exercise special care in preparing them, should he decide to give them at all. *Bollenbach* v. *United States*, 326 U.S. 607, 611-612 (1946).

In view of appellants' failure ever to object to the court's handling of this matter, Corsa cannot reasonably argue that the trial judge's failure to reinstruct the jury at 5:30 P.M. on Friday constituted reversible error. *United States* v. *Pfingst*, 477 F.2d 177, 197 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973); *United States* v. *Bowles*, 428 F.2d 592 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970).

Appellants also contend that the judge "browbeat" the jury into withdrawing their request. The record clearly shows that, quite to the contrary, Judge Pratt's careful and meticulous handling of this entire matter could only have suggested to the jury that his primary concern was to give them a thoughtful response.[10]

POINT III

The Evidence Against Appellants Marc Rauch and Corsa was Sufficient.

Appellant Corsa also contests the sufficiency of the evidence which convicted him. Specifically, he argues that the evidence failed to establish that the various representations made in the blue brochure and by the salesmen were false or that he knew they were false. Appellant Marc Rauch adopts these contentions with respect to his

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[10] Noting that one of the jurors was married to an attorney, appellants speculate that the jury abandoned their request to be reinstructed because they had obtained definitions from outside the courtroom. There is nothing in the record to indicate that the jury disregarded the judge's cautionary instruction not to discuss the case during the weekend.

own conviction (Br. 32). Appellants' argument must fail. The evidence of misrepresentation and Corsa's knowledge was overwhelming. The central vehicle for accomplishing the fraud in this case was the elaborately prepared and presented sales literature, the blue brochure. From both its form and content, the reader could only conclude that FCR was an old, established company of many years with noted numismatic experts (Gov't App., pp. 1A-2A). Indeed, that was the consensus of the victim witnesses based on a reading of the blue brochure which they received in the mail. But for the outrageously false claims presented in the brochure about the company, its staff and its product, many of the victims would not have invested with FCR.

Another aspect of the fraud was the unconditional money back guarantee which, for the most part, was not honored by FCR. The witnesses who testified at trial clearly established that the guarantee amounted to a mere ploy; victims who demanded refunds in most instances did not receive their money (170, 644, 1086); those who received coins were provided coins which were systematically overvalued and overpriced (Gov't Ex. 163).

There is no question but that Corsa knew of the glaring misrepresentations in the blue brochure since both he and Marc Rauch personally reviewed the original white brochure and changed little more than the color of the cover (2549, 3225). Moreover, FCR was a small family business run by appellants, who shared offices and closely consulted with each other about the operations of the business (421-424). It defies reality for any of appellants to claim ignorance of their various deceptions, especially in light of general manager Cito's memo on this matter and in light of the innumerable customer complaints, throughout the relevant time period, about FCR's failure to honor its representations. Indeed, when Mr. Pieroni attempted to exercise his contractual right to a refund in

person, appellants refused outright to honor the guarantee. (1087-1088).

Nor can appellants reasonably contend, in light of the record, that they were unaware that the purchase price of the coins was inflated. Virtually every coin of the sample graded by the Government's expert, Harvey Stack, was overgraded and overpriced. The defense sought to create a smokescreen by attacking the method by which Mr. Stack, one of the foremost and well-respected numismatists in America, arrived at his grades. However, no outside expert refuted Mr. Stack's grades. Rather, the witness called by the defense, Mark Singer, the owner of a small coin shop on Long Island, testified that he terminated his business relationship with FCR and the defendants after he was besieged with daily telephone calls from appellants Marc Rauch and Corsa in which Corsa, the individual who was primarily responsible for buying and grading all of FCR's coins (3212), peppered Singer with "questions of an elementary nature" about coins (2645). The defense's own witness testified Marc Rauch and Corsa "had as much numismatic knowledge as a moderate collector" (2646). Singer also testified on cross examination that he warned appellants Marc Rauch and Corsa that the prices for their coins were too high and that FCR's customers could purchase the same coins at any local coin shop cheaper (2678, 2679).

In the face of such evidence there can be little doubt that the evidence against appellants Marc Rauch and Corsa was more than sufficient to sustain the jury's verdict.

POINT IV

The Evidence Against Appellant Sol Rauch was also Sufficient.

Appellant Sol Rauch also contests the sufficiency of the evidence and claims in this regard that the trial judge erroneously denied his motion for judgment of acquittal at the end of the Government's case in chief.

It is well settled in this Circuit that once a defendant introduces evidence at a trial, he waives any claim concerning the Government's failure of proof on its case-in-chief. *United States* v. *Coblenty*, 453 F.2d 503, 506 (2d Cir. 1972); *United States* v. *Rosengarten*, 357 F.2d 263, 266 (2d Cir. 1966). Moreover, such a waiver occurs whenever the defendant offers evidence, even if (unlike the instant case) the trial judge reserves decision on the defendant's motion for judgment of acquittal at the end of the Government's case. *United States* v. *Brown*, 456 F.2d 294, 295 (2d Cir. 1972). Sol Rauch's claim that, for sufficiency purposes, the evidence against him should be restricted to the Government's case-in-chief is therefore frivolous.

In view of the small size of their business, appellants' family relationship and their common involvement in the success of the enterprise, none of the appellants can claim a lack of guilty knowledge of FCR's fraudulent activities.

In any event, the evidence adduced in the Government's case in chief against appellant Sol Rauch was more than sufficient. Appellant Sol Rauch was involved in the top management of the company, conducted meetings regarding FCR's operations (421, 422), and was aware as early as August 7, 1974, of the business difficulties incurred by FCR (414, Gov't. Ex. 122). Moreover, the jury could reasonably infer that appellant Sol Rauch

had control over FCR's finances (1195), that he travelled extensively on behalf of FCR and received a weekly salary equal to, if not greater than, that of appellants Marc Rauch and Corsa, FCR's president and vice-president respectively (1140). It was also established that appellant Sol Rauch dealt directly with at least two of FCR's customers and travelled to Chicago to attend the American Medical Association convention at which FCR had a display booth (1199).

Upon this evidence, Judge Pratt, in denying appellant's motion to dismiss at the conclusion of the government's case, stated (2027): ". . . there seems to be no doubt that [Sol Rauch] could be found guilty as an aider and abettor of the activities, although he may not have participated directly in them".[11]

POINT V

Marc Rauch and Lawrence Corsa Were Adequately Represented by Counsel and No Conflicts Existed Between Them and Sol Rauch.

Appellants Marc Rauch and Lawrence Corsa contend that their defense counsel was incompetent; they argue further that he was burdened by a "conflict of interest"

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[11] Any arguable doubt as to appellant Sol Rauch's guilt was eliminated after he testified on his own behalf. Appellant denied any involvement at all in the activities of FCR. However, the jury could have disbelieved this testimony (and probably did, since Sol was seriously impeached) and indeed could properly have drawn a contrary inference. (2432, 2444-46, 2452). *United States* v. *Mariani*, 539 F.2d 915, 920 (2d Cir. 1976); *United States* v. *Arcuri*, 405 F.2d 691, 695 (2d Cir. 1968); *cert. denied*, 395 U.S. 913 (1969); *Dyer* v. *MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952).

since, contrary to their best interests, he felt obliged to assist Sol Rauch (who conducted his own defense). Appellant Marc Rauch also contends that the trial judge failed properly to advise him of this potential conflict. Additionally, Corsa argues that although he consented to allowing Marc Rauch rather than their counsel to cross-examine the government's expert witness, the court did not properly advise him of the disadvantages of being represented by a non-lawyer.

Marc Rauch and Corsa cannot persuasively argue that their attorney's conduct of the trial was "of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice". *United States* v. *Medico*, 557 F.2d 309, 318 (2d Cir. 1977); *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1959). And, in this connection, it is well settled that "proof of the efficiency of such assistance lies in the character of the . . . proceedings . . ." *Wojtowicz* v. *United States*, 550 F.2d 786, 792 (2d Cir. 1977), quoting *United States* v. *Wight*, *supra*, 176 F.2d at 379. We believe that, whether viewed through the *Wight* test or any other suggested standard, *Richenbacker* v. *Warden, Auburn Correctional Facility*, 550 F.2d 62, 65-66 (2d Cir. 1976), the record in this case demonstrates that Marc Rauch and Corsa were effectively represented. Their attorney conducted an extensive cross-examination of all Government witnesses, presented an elaborate defense, and—though burdened with a bad set of facts—he vigorously fought for an acquittal. Nor did their attorney's representation of them conflict with his attempts to assist Sol Rauch.

In the first place, the appellants presented a unified defense and no conflicts existed between Corsa and Marc Rauch on the one hand and Sol Rauch on the other. The aim of all three defendants—which was quite reasonable

under the circumstances—was to demonstrate that FCR was not engaged in fraudulent activities. In light of this unified defense, it well behooved the defendants at trial to assist each other. Indeed, an attempt by any of the defendants to adopt a different strategy would have undercut the defense of them all. Corsa and Marc Rauch now suggest, doubtless as a post-trial afterthought, that their counsel would have served their interests better had he emphasized their youth, as compared to Sol Rauch, and their relatively later entry into the business, thereby suggesting that they were helplessly drawn into the vortex of Sol's machinations. This claim is greatly undermined by the fact that, if anything, they rather than Sol Rauch were admittedly the principal participants in the entire operation.

Appellants inability to demonstrate prejudice in this regard is dispositive of their claim that the judge committed reversible error in not fully exploring the ramifications of the alleged conflict. In any event, on August 18, 1977, prior to the trial, Judge Pratt did explore the potential conflict which can arise when a defendant appears *pro se* (as well as the possible conflict in the joint representation of Corsa and Marc Rauch). The court permitted appellant Sol Rauch, an attorney, to represent himself only after learning that he was admitted to the Eastern District, having been a member of the bar for 20 years. (Minutes of August 18, 1977, pp. 3, 4, 6). Appellant Sol Rauch, who had successfully represented himself in at least two other criminal matters, advised the court that he was aware of the inherent problems which existed in representing himself. (Minutes of August 18, 1977, pp. 3-8). Counsel for appellants Marc Rauch and Corsa never advised the court of any conflict or moved to sever their case from the *pro se* defendant. This was quite proper since no real conflict appeared at any time throughout the trial. Moreover, this court has

never held that a *DeBerry* hearing is required whenever one of the defendants in a multi-defendant trial appears *pro se*. See, *United States* v. *Sacco*, 563 F.2d 522 (2d Cir. 1977).

Significantly, all appellants testified and, prior to Sol Rauch's testimony, the court elicited from appellants Marc Rauch and Corsa their consent. At this point, the trial court noted (2170): "So far I haven't seen anything in the position taken by the defendants that even hints of a conflict. They all seem to be urging the same points."

In *United States* v. *Sacco*, 563 F.2d 522 (2d Cir. 1977), this court set forth a number of suggestions for a trial judge to follow to assure that prejudice does not result when a defendant appears *pro se* in a multi-defendant case. Judge Pratt complied with all these suggestions. Moreover, considering the fact that the *pro se* defendant here was an attorney with criminal law experience, coupled with the family relationship among appellants and the family business under scrutiny, it cannot be seriously argued that any prejudice inured to appellants Marc Rauch or Corsa because of Sol Rauch's *pro se* defense.

Appellant Corsa further argues that he was inadequately represented when, with his consent, co-appellant Marc Rauch cross-examined the government's expert witness. However, he chose to permit this examination and the trial court obtained his express consent (146). Moreover, appellant Marc Rauch conducted a lengthy, effective examination, drawing praise from the trial court on two occasions (1628, 2022-23). The court stated (2022-23): "I thought Mr. Mark [sic] Rauch's cross-examination of Mr. Stack was excellent. He may have missed his calling. He was well organized and moved

quickly from one subject to another and I thought covered the ground quite well."

We also note that the trial court allowed counsel representing appellants Marc Rauch and Corsa to cross-examine the government's expert. While the court was prepared to limit this examination, Mr. Goldman cross-examined Mr. Stack for what amounted to forty pages of transcript (1869-1906). With appellant Sol Rauch also cross-examining the expert, it can hardly be argued that appellants were not able to confront the issue of FCR's coin grades and prices.

Simply stated, appellants' Sixth Amendment claims constitute nothing more than second-guessing their trial strategy. As such, they should be summarily dismissed.

POINT VI

There Was No Amendment to the Indictment; Rather, Appellants Were Tried and Convicted on a Superseding Information to Which They All Agreed.

Appellant Sol Rauch contends that the superseding information, under which he consented to be prosecuted, contained improper references to the grand jury. He argues that the trial court, in reading this accusatory instrument to the jury, improperly amended it by deleting the improper references to the grand jury. Although failing even to allege any prejudice he may have suffered as a result of these errors, appellant Sol Rauch nevertheless argues that such improper actions mandate reversal. Appellant Corsa also takes issue with the accusatory instrument. He argues that his waiver and signature on the formal waiver form which occurred in open court, wherein he agreed to proceed to trial on the

superseding information rather than the underlying indictment, was coerced.

1. On March 1, 1977, Judge Pratt held a pretrial conference among the attorneys in an effort to shorten the projected length of the trial (A. 24, 25). One suggestion which was agreed to by all was to eliminate the additional issue of whether the sales by FCR of coin portfolios constituted an "investment contract" under the federal securities law (A. 93). Since the scheme and misrepresentations set forth in the indictment applied equally to the mail counts and security counts, it was agreed merely to transform the security counts into mail counts by means of a superseding information (A. 5-12, 107). These additional mail fraud counts, Counts 11 through 15, consisted of the same mailing dates, senders, and accounts which formed the basis of the security counts. Moreover, the outline of the scheme to defraud and the misrepresentations set forth applied equally to the mail fraud counts and security fraud counts.

On March 8, 1977, this superseding information was filed with no objection (Minutes of March 8, 1977, p. 10). The court advised appellants Sol Rauch and Marc Rauch of the rights they waived by agreeing to proceed by information and thereafter obtained written waivers from them (Minutes of March 8, 1977, pp. 10-12).

On March 14, 1977, appellant Lawrence Corsa, after the court determined that he had discussed the waiver of indictment with his attorney, similarly agreed to proceed by information and signed the appropriate waiver form (4, 5).[12]

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[12] The court conducted the following colloquy with both Corsa and his attorney in open court (4, 5):

2. Even though he waived indictment to proceed to trial on an information, Sol Rauch now contests the propriety of that accusatory instrument (as we understand his argument). He appears to complain of the inadvertent references in the information to the "Grand Jury" rather than to the "United States Attorney" and the court's *sua sponte* correction of these errors in reading the information to the jury during the charge. However, the distinction between "The Grand Jury charges" as opposed to "The United States Attorney charges" was trivial since the court instructed the jury that the accusatory instrument was not evidence and was to be given no weight (3184-85, 3629).

With respect to the trial judge's amending the information, it is well settled that the information can be amended at any time before a verdict so long as the substantial rights of the defendant are not prejudiced. *United States* v. *Peach Mountain Coal Mining Co.*, 161

[Footnote continued from preceding page]

The Court: We have another matter; Mr. Corsa has to waive indictment here. Have you reviewed this problem with him, Mr. Goldman?

Mr. Goldman: Yes, he waives.

The Court: Mr. Corsa, you understand that in order to eliminate the SCC [sic] aspects from this case, we had prepared a superseding information, which is officially a charge by the U.S. Attorney rather than by the Grand Jury, which does not differ in any material respects, other than to change to simple mail fraud the five SCC [sic] counts of the indictment. Technically we cannot go ahead on that without a waiver of indictment from the Defendants. Sol Rauch and Marc Rauch have both signed the waiver and my question to you is do you also wish waive the formality of presenting this to the Grand Jury, or what is your feeling?

Mr. Corsa: I will sign.

The Court: You'll waive it, all right. Would you sign it now, please?

Mr. Corsa: Yes.

F.2d 476, 477 (2d Cir. 1947); *United States* v. *Averill*, 296 F. Supp. 1004, 1015 (E.D.N.Y. 1969). Indeed, such an amendment can even be made, *sua sponte*, by the trial judge. *United States* v. *Blanchard*, 495 F.2d 1329, 1332 (1st Cir. 1974).

Since the error in the information here was purely clerical, and did not affect appellants' interests, the action by the trial judge was entirely proper.

Equally unpersuasive is Corsa's argument that he did not knowingly consent to be tried under the superseding information. As detailed above (pp. 38-39, *supra*), Corsa knowingly waived indictment and consented to be tried under the superseding information. The waiver amounted to little more than consent to technical charges in the then-existing accusatory instrument.

POINT VII

The Prosecutor's Actions Were Proper.

Appellants each contend that various actions by the prosecutor during the trial and before the grand jury constitute misconduct mandating reversal.

1. Appellants Marc and Sol Rauch allege that they were "tricked" into testifying before the Grand Jury by the prosecutor's false promise that he would allow them to testify a second time before the grand jury. Prior to the commencement of trial appellant Marc Rauch moved to dismiss the indictment, contending that he was tricked into testifying before the grand jury by the prosecutor's false promise that he would be permitted to testify a second time. Marc Rauch argued that this deception resulted in his grand jury testimony being involuntary and such conduct mandated dismissal of the indictment (A. 20). Marc Rauch did not deny that he had been fully advised

of his constitutional rights and of his status as a target of the grand jury investigation, and that he had waived his rights on the record and proceeded to testify for over 100 pages of transcript (A. 22). At the hearing held before Judge Pratt on February 10, 1977, Marc Rauch produced as witnesses five members of his family who testified as to this alleged promise. This testimony, charitably characterized by the trial judge as being ". . . in remarkably similar detail and language" (A. 21), was flatly denied by the Assistant U.S. Attorney.

In his opinion on this matter, Judge Pratt, while expressing ". . . doubts about the credibility of defendants' witnesses on this point . . .", found it unnecessary to determine whether such promises had been made. The court reasoned that such promises, even if made, would not constitute conduct requiring the dismissal of the indictment (A. 22). The court in reviewing the grand jury testimony, found that Marc Rauch's testimony was ". . . unquestionably voluntary" (A. 22).

The court's analysis was correct (A. 22). In any event, since there can be no claim that there was insufficient evidence to indict appellants, there appears to be no reason to vary from this Circuit's rule that an indictment valid on its face will not be dismissed because of the nature of the evidence which was presented to the grand jury.[13] Finally, of course, Marc Rauch had no right to withhold information from the Grand Jury, *United States*

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[13] See, *United States* v. *Piccini*, 412 F.2d 591, 593-54 (2d Cir. 1969, *cert. denied*, 397 U.S. 917 (1970); *United States* v. *Colasurdo*, 453 F.2d 585, 595-596 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *United States* v. *James*, 493 F.2d 323, 326 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974); *United States* v. *Weinstein*, 511 F.2d 622, 627 (2d Cir.) *cert. denied*, 422 U.S. 1042 (1975); *United States* v. *Bertolotti*, 529 F.2d 149, 159 (2d Cir. 1975).

v. *Calandra*, 414 U.S. 338, 343 (1974); *Kastigar* v. *United States*, 406 U.S. 441, 443 (1972); and he never requested a second appearance, *United States* v. *Gardner*, 516 F.2d 334, 339 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975); *McCarm* v. *Thompson*, 144 F.2d 604, 605-606 (2d Cir.), *cert. denied*, 323 U.S. 790 (1944).

2. Sol Rauch and Corsa also point to the prosecutor's statement in his rebuttal summation questioning the necessity of calling as witnesses all of FCR's customers to gain an accurate view of the company. Appellants claim that this constituted improper "testimony" by the prosecutor, allegedly implying his belief that all 500 customers of FCR were defrauded. From the inception of the trial one of appellants' defenses was that all businesses have "unsatisfied" customers, and the government was unfairly portraying FCR by calling as witnesses those few unsatisfied customers of FCR. This argument was first made in counsel's opening to the jury; it was repeated in the testimony of Marc Rauch; and it was reargued to the jury in defense counsel's summation (32, 2836, 2860). In arguing to the jury in his summation that "[the Assistant U.S. Attorney] cut a lot of corners in this case" (3505), counsel for appellants Marc Rauch and Corsa questioned the motive of the government in introducing evidence that unfairly demonstrated FCR's operation (3510). Likewise, appellant Sol Rauch argued in his summation that ". . . [FCR] had 500 customers. Why are they so few. They purportedly sold 1800 coins, 2000 coins, Why are 17 picked out?" (3614).

In response to these arguments the prosecutor stated in his rebuttal summation:

> "We only had thirteen and with two additional ones at the end, 15 victim witnesses. We could have called 500 people and gotten a real good view of the company. Do you think that was

> necessary? Did you see a common pattern or threa[d] through the individuals that the Government called?" (A. 122)

As the trial court properly determined in denying appellant's motion for a mistrial, these comments were entirely proper (3626-27). A reading of this remark clearly establishes that it was in response to appellant's repeated arguments to the jury that the government picked out a small number of FCR's investors, thereby imparting to the jury an inaccurate and unfair image of FCR. As such, the prosecutor's remarks were proper and, indeed, well within the bounds of fair comment. *United States* v. *Wilner*, 523 F.2d 68, 73-74 (2d Cir. 1975). Appellant's strained interpretation of these remarks is simply erroneous, as the trial court so found.

Appellant Sol Rauch also argues that he was improperly questioned before the grand jury regarding a Canadian securities fraud conviction, which was subsequently reversed and improperly questioned before the petit jury regarding his involvement in Brigadoon Scotch Distributors.

While appellant's brief (p. 38) contains utterly unsupported speculation as to the Government's motive in questioning appellant as to Bridgadoon, the record reflects an appropriate justification. In his direct examination appellant Sol Rauch contended that as attorney for Brigadoon his full time was devoted to its many problems. Thus, he allegedly had no time to involve himself in FCR matters (2293). On this basis alone, the government was allowed to explore on cross-examination the nature and extent of this involvement. See, *United States* v. *Pacelli*, 521 F.2d 135 (2d Cir. 1975); *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); Federal Rules of Evidence, Rule 611(b). Moreover, the government sought to introduce Brigadoon as a similar act

against appellant, but permission was denied by the trial judge. We submit that the trial court improperly denied the government's application. As was adduced through the limited examination permitted by the court, appellant was the attorney for Brigadoon which as of January 1974 had $800,000 in outstanding claims (2288, 2296). The government argued that appellant was using his position as an attorney as a shield in Brigadoon just as he was doing in FCR, a controlling figure behind the scenes. As such, his position at Brigadoon had significant probative value on the issues of knowledge and absence of mistake or accident. Federal Rules of Evidence, Rule 404(b), *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Wright*, 406 F.2d 1256, 1258 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

In any event, the trial judge properly exercised his discretion in allowing the government a limited probe into this defense raised by appellant. See, *United States* v. *Kaufman*, 453 F.2d 306, 311 (2d Cir. 1976). Moreover, appellant can hardly contend he was prejudiced. The prosecutor never mentioned Brigadoon in his summation and the court gave a limiting instruction to the jury when a reference to Brigadoon was initially raised during the course of the trial, and instructed the jury in his charge to disregard it (2289, 3668).

Lastly, there is no substance to Sol Rauch's contention that the prosecutor improperly questioned him before the grand jury regarding a Canadian conviction which was subsequently reversed. These questions were proper.

Even assuming that the questions were not proper, there is no ground to dismiss the indictment. See cases cited *supra*, p. 41, n. 13. Appellant does not even contend that there was insufficient competent independent evidence to sustain the indictment. In any event, this matter, never raised during trial, is not properly before this

Court. Appellant's obvious grasping for arguments is indicative of his precarious position.

POINT VIII

Appellants Were Not Prejudiced by the Manner in Which the Jury Was Selected.

Appellant Marc Rauch argues that the trial court's method of selecting a jury panel of fourteen jurors without designating the two alternates until immediately prior to their deliberations is in clear violation of Federal Rules of Criminal Procedure, Rule 24(c). Moreover, appellant contends that this method of jury selection prejudiced him because a more thorough inquiry would have been conducted of the two jurors who were excused during the course of the trial had they been categorized as regular jurors.

Appellant's argument is without merit. While it is true that the method of not designating alternate jurors until immediately prior to deliberations could be considered as not fully complying with a strict reading of Rule 24(c), appellant's strained attempt to establish some prejudice due to this selection method fails even though he distorts the record attempting to do so. Moreover, the sound logic behind not designating alternate jurors until immediately prior to deliberation so that all jurors will attentively consider all the evidence, counsels' summations and the court's charge, certainly justifies a departure from strict compliance with Rule 24(c).

Appellant Marc Rauch argues that the decision to excuse juror number 2 prior to summations, thus reducing the panel to twelve since another juror had been dismissed early in the proceedings, prejudiced him. In support of this argument he notes that it was subsequently discovered that one of the remaining twelve jurors

harbored prejudice toward not Marc Rauch but Lawrence Corsa. Somehow, appellant contends, Judge Pratt's jury selection method caused this prejudicial situation. Besides the logical inconsistency of this argument, the record fails to support appellant's contention that any juror was prejudiced toward anyone. In fact, a reading of the record clearly establishes that no improprieties existed and that Judge Pratt's handling of the jury was entirely proper.

After receiving a note from juror number 2 at the close of the evidence in the case, Judge Pratt discussed with counsel the juror's concern regarding his inability to transport his mother, who had just undergone surgery, to her doctor's appointment. (3413). After questioning the juror *in camera*, all parties agreed to excuse him. (3426).

Then, rather gratuitously, appellant Sol Rauch, for the first time, related to the court a comment he allegedly overheard a few days earlier by juror number 3 questioning appellant Lawrence Corsa's numismatic expertise. (3430). No one else had heard the alleged remark by the juror. The trial court decided that no action regarding this alleged comment was appropriate at that time.

After the verdict the court conducted an examination of juror number 3. She flatly denied making any such statement (3702). Moreover, she stated that she had an open mind throughout the case and held no bias or prejudice toward appellant Corsa (3702). Counsel had no additional questions to ask the juror (3702). Upon the inquiry the court was "... particularly impressed with her reaction to my questions to her" and was satisfied that there was no motivation of prejudice or pre-judgment (3705). Counsel for appellants voiced no opposition.

Marc Rauch contends that had juror number 2 been categorized as a regular juror, the inquiry into deciding

whether to excuse him would have been more searching. Such an inquiry, he argues, might have resulted in his remaining a juror, thus creating the possibility that juror number 3 could have been removed and a jury of twelve would have remained. This speculation has little to do with the court's jury selection method. In any event, the court can hardly be faulted for excusing juror number 2, who had legitimate concern for his mother's well-being. Further, the record clearly establishes that juror number 3 did not make the statement attributed to her; and she stated that she had an open mind and harbored no prejudice. Accordingly, the technical violations of Rule 24(c), unobjected to at trial, hardly constitute the requisite "... miscarriage of justice or ... error seriously affect[ing] the fairness of the trial" for this Court to exercise its discretion to notice "plain error". *United States* v. *Colabella*, 448 F.2d 1299, 1302 (2nd Cir. 1971).

POINT IX

Appellants' Additional Allegations of Error are Without Merit.

Appellants Marc Rauch and Corsa argue that a number of additional alleged errors, although unobjected to at trial, constitute "plain error" requiring reversal. Appellant Marc Rauch takes issue with three decisions made by the trial court: (1) allowing the victim witnesses to relate the independent appraisals of their coins they obtained to show their state of mind; (2) improperly limiting the cross-examination of the government's expert; and (3) erring in allowing the government to introduce its rebuttal evidence. Appellant Corsa contends that the misuse by the government of a chart which compared the expert witness's opinion of the grades attributed to those coins by FCR constitutes "plain error". Also, Corsa objected to hearsay evidence adduced from FCR's receiver.

wholly without merit. Appellant examined Stach for literally hundreds of pages of transcript over more than a full day of the trial. Although the court praised appellant for his excellent handling of the cross-examination, toward the end of this lengthy examination appellant's questions became less precise and more argumentative, as well might be expected from a layman examining an expert witness. However, it was appellant's choice, after airing the relevant considerations with the court, to match FCR's coin expert against the government's expert. Their apparent second-guessing of this tactic has no place in this appeal.

Appellant Rauch misconstrues the purpose of the government's rebuttal evidence and further errs in his reading of the law in arguing that the court improperly permitted the government to introduce two additional victim witnesses in rebuttal. From their opening remarks to the jury through their own testimony, appellants argued that the thirteen witnesses called by the govern-

The trial judge properly permitted the victim witnesses to testify as to the appraisals they obtained not for the truth thereof, but for the purpose of determining the state of mind of the witnesses so as to better understand their subsequent dealings with FCR. Such testimony, admissible pursuant to Federal Rules of Evidence, Rule 803(3), was well within the parameters of the court's broad discretion. This determination can hardly be faulted since the court gave a limiting instruction as to the use of such testimony (162-63), the court limited the testimony itself regarding these appraisals, and, in any event, the coins were subsequently appraised at trial by the government's expert. The trial court's determination that the probative value of this evidence outweighed any danger of unfair prejudice was proper.

Appellant Marc Rauch's contention that the trial court improperly limited his examination of Harvey Stack is wholly without merit. Appellant examined Stack for

court properly allowed such testimony and adequately instructed the jury as to the use of such testimony both at the time it was offered and in his charge (3262, 3634, 3653-54).

Appellant Corsa contends that the government improperly used a chart which set forth its expert's appraisal of FCR's coins juxtaposed with the value and grade FCR attributed to them (Ex. 163). He argues that its use was unnecessary for it merely underscored the testimony of the expert.

Appellant does not contest, nor could he, that courts have traditionally admitted graphic illustrations designed to make evidence already introduced more intelligible. *United States* v. *Fabric Garment Co.*, 262, F.2d 631, 637-38 (2d Cir. 1958), *cert. denied*, 359 U.S. 989 (1959); *United States* v. *Bramson*, 139 F.2d 598 (2d Cir. 1943), *cert. denied*, 321 U.S. 783 (1944) (chart used to illustrate mail fraud).

ment represented the only "unsatisfied" customers of FCR (32, 2860, 3110). This contention culminated in appellant Marc Rauch's testimony that other than the thirteen government witnesses all other FCR customers received their coins or money (2860, 3110).

In response to this, the government called two additional witnesses who invested in FCR and never received coins (3257, 3851). Clearly, such evidence may be introduced to refute appellants' testimony on a material issue of fact. See, *United States* v. *Johnson*, 208 F.2d 404, 406 (2d Cir. 1953), *cert. denied*, 347 U.S. 928 (1954); see also, *United States* v. *Boatner*, 478 F.2d 737, 743 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973).

Moreover, the government had every right to introduce such additional victim witnesses' testimony as similar acts. Federal Rules of Evidence, Rule 404(b). The trial court properly allowed such testimony and adequately

Here, the government's expert appraised nineteen coins which various customers had received from FCR. In all but one appraisal his evaluation was lower than what FCR attributed to the coin in regard to its grade and price. This information was set forth in a chart (Ex. 163). Appellant's argument that such figures and pattern of grading and pricing of nineteen coins could be absorbed and retained by jurors without some form of graphic illustration is disingenuous at best. Clearly, this was proper evidence to compile and present to the jury in an organized manner.

Lastly, appellant Corsa argues that the government elicited inadmissible and highly prejudicial testimony from FCR's receiver, which, although not objected to at the time, constitute "plain error" requiring reversal.

In response to appellant's defense that they were operating a legitimate business, FCR's receiver testified in the Government's rebuttal that a marshalling of FCR's assets revealed only a few hundred dollars and no coins (3296). Since a number of witnesses testified that they had sent in their money to FCR and were awaiting delivery of their coins at the time of the SEC injunction, such evidence was relevant and material to refute appellants' good faith defense. The receiver further offered testimony regarding his knowledge of a number of complaints and inquiries by FCR customers to the SEC. Such testimony was relevant to contradict appellant Marc Rauch's testimony that he went to the SEC and satisfied all the complaining customers of FCR (3076). It was also relevant to appellant's intent and good faith. See, *United States* v. *Press*, 336 F.2d 1003, 1011 (2d Cir. 1964), *cert. denied*, 379 U.S. 965 (1965). In any event, such conclusionary testimony, which consisted of less than one page of transcript in a 3700 page record was, at most, harmless error.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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APPENDIX

The Federal Coin Reserve Inc.

Professional Selection And Supervision

The Reserve's coins are carefully and continually supervised by expert investment and numistic specialists and counselors. Accountants oriented toward capital appreciation form an integral part of the advisory committee. Most organizations in the coin market are composed of men who are well versed and learned in the area of numismatics. However, they are often lacking in the specialization of personal and corporate investment for capital appreciation and unversed in the more general picture of individual investment portfolios. The Federal Coin Reserve is specifically oriented for professional people, corporations and financial institutions with and without knowledge of this market and to the growth and development of their investment portfolios.

Reinvestment Of Capital Gains

All profits and capital gains received by the individual members, member firms and clients will be reinvested in additional coins without sales charge.

Accounting Services

Individual members and member firms will be provided semi-annually, or more often upon request, with accounting statements showing all transactions and with records for use in reporting taxes, if so applicable. A Certified Public Accountant is generally assigned to oversee each and every individual account, from $5,000 and up, and will be in close contact with the individual in charge of the account, so as to study his general financial picture and adjust the account to as best he integrated into that financial picture. Where short term growth is deemed applicable, the executive in charge of that account will be so instructed after careful conference between the accountant and member. Generally, we find that in-

vestors through the Federal Coin Reserve have required long-term capital gains, taxable on this basis, as well as special estate planning and the tax advantages derived therefor through investment in rare coins.

INFORMATION

Coins are not another mere investment. They are a source of interest and enjoyment for entire families. Data becomes available daily and often hourly on new developments.

Information is a key to profits as well as to mounting interest. For this reason, the Federal Coin Reserve, through its management consultant THE HARTFORD GROUP, provides members with regular financial reports and other facts deemed of significant value and merit whether institutional, individual, partnership or corporate member.

Remaining "on top" of this myriad of information is impossible for most people and yet it is the key to investment success. THE HARTFORD has people working all day long, each and every day making certain that all potential avenues of profit are fully explored.

DIVERSIFICATION

Investment experts agree that diversification within or without a specific and specified realm of investment is essential. The Hartford Investment Group, with its expert knowledge of U.S. currencies and currency controls, will provide such diversification in its selection of coins for purchase and sale. Such knowledge and diversification is not within the means of most investors.

OPTIONS

Each member or member firm is assigned a specific Investment-Numismatist Account Executive who is available at any time during standard business hours to help you

with your specific investment neds. All such executives are registered members of The American Numismatic Association, chartered by an Act of Congress in 1912. The Federal Coin Reserve in its wide range of programs and options available aides the investor on a personal and private basis in meeting his needs and/or goals.

COMMUNICATIONS SYSTEM

The Federal Coin Reserve has one of the most advanced systems of rapid communications available today. In this way, and through its WATS (Wide Area Telephone Service) lines, the entire continental United States is as close as its telephone. Excellent opportunities that become available spontaneously and must be procured instantly are thus available to all members through their account executives no matter where in the continental United States they may reside or work. What's more, all calls made by you to your executive from anywhere in the United States are toll free, thus costing you nothing.

COMMUNICATIONS-PURCHASING

Conversely to the above, wherever in the continental U.S. a purchase of quality becomes available, The Federal Coin Reserve is there first before most brokers, dealers and collectors are even aware of the availability of the transaction. Coin Reserve agents are dispatched to auctions and estate liquidations around the world to assure proper supply to clients.

Coins held by individual clients, member firms and institutions are each registered and cross indexed according to standard criteria so that upon the market warranting it, The Federal Coin Reserve can call your coins and if you so desire, actively trade in order to attain the greatest profit for your investment.

Daily Bidding

The Federal Coin Reserve, due to its facility in placing and depositing for reserve coins of every type, will bid on any and all coins deemed of worthy quality offered to it from anywhere in the world at any time during standard business hours.

Quotes are available daily on coins held by purchasers and members. Two (2) nationwide teleptype systems operate daily, providing up-to-the-minute quotations.

Reserve Funds And Mass Purchase Power

There are "buys" in any market, whether it be real estate, common stock, municipal bonds or coins. Due to the reserve funds and the mass purchase power afforded it, The Federal Coin Reserve can pick up available coins at prices that individual investors or even institutions are often unable to approach. Often coins are unavailable for sale "at any price" since they may form part of a considerable collection. In such instances, and where deemed necessary, the reserve funds allow purchase of the entire collection. Savings derived from such reserve funds are passed on to all purchasers and members on an equal basis. All clients receive equal treatment once accepted, whether their accounts are $25,000 or $25,000.000.

Insurance

All coins purchased through The Federal Coin Reserve may be insured against theft or loss. The client may elect such coverage simply by instructing his account executive to make the necessary arrangements and registrations.

Coins delivered via the U.S. Postal Service are insured for full value by the U.S. Government.

Tax Advice And Consultation

Tax experts are retained by The Federal Coin Reserve to provide in depth tax suggestions as regards coin investment and their integration into your investment portfolio. There is no charge for this service.

Minimum Return

The Federal Coin Reserve looks forward to a minimum appreciation of 100% every five (5) years. This is in no way meant to indicate a guarantee of the future. However, over the past thirty (30) years this rate has been well maintained and no reason is foreseen for any decline. It is highly recommended that investing in coins for pleasure and profit be undertaken on a twenty (20) year basis, or more, in order to fully realize the geometric progression potential of the aforementioned.

Depository

Coins may be left on deposit for the member in The Federal Coin Reserve vaults at no charge. Documents of title, buy-sell orders and all necessary documents are forwarded to the member. Depository service is recommended only for quick trade procedures, which are generally speculative in nature. Unless such speculation is a consideration in a portfolio, it is not recommended to leave coins deposited since, unlike stock certificates, a great deal of the join of coin collection and investment is in their physical appreciation and possession.

Bibliography

A complete bibliography of coin and coin related books, publications, and other materials deemed of significant interest can be obtained by requesting same of your account executive.

(Neither THE FEDERAL COIN RESERVE nor THE HARTFORD INVESTMENT GROUP sell such printed

matter. Printed matter relating to coin investment is tax deductible as information for use in investment decisions.)

Registration

Coins are purchased outright and no formal registration of ownership is required. However, for our records as well as for your own, coins are registered and title papers supplied. They may be registered in the name of an individual, partnership, bank, corporation or joint tenants with rights of survivorship. Under the regulations of The Uniform Gifts to Minors Act, coins may be registered in the name of minors with Custodianship.

Fees

There is no membership or enrollment fee. No minimum annual investment is required.

For those who request monthly or otherwise scheduled purchase arrangements, theirs will always be the option to increase or decrease their purchases or discontinue their individualized program at any time.

Estate Planning

Coins offer many advantages not offered by any other investment vehicle where estate planning is concerned. (See: Taxation-Advantages) If your situation necessitates same, simply instruct your account executive to have an estate consultant contact you.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Stanley Walden being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 10th day of March 1978 he served a copy of the within

Brief for the Appellee and appendix

by placing the same in a properly postpaid franked envelope addressed to:

Donald Nawi, Esq., 29 Iselin Drive, New Rochelle, N.Y. 10004

Jack Kaplan, Esq., 2 Wall St., New York, N.Y. 10005

Joseph P. Hoey, Esq., 84 William St., New York, N.Y. 10038

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Stanley Walden

Sworn to before me this
10th day of March 1978

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4643824
Qualified in Kings County
Commission Expires March 30, 1979